No. 14,923

IN THE

United States Court of Appeals

For the Ninth Circuit

MARTIN JIMENEZ,

Appellant,

vs.

BRUCE BARBER, District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District,

Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF OF THE APPELLEE.

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BRIEF OF THE APPELLEE.

STATEMENT OF THE CASE.

Plaintiff is admittedly an alien illegally in the United States. There is, therefore, in this case no issue as to the ultimate fact of his deportability as an alien. The sole issue before the Court arises from plaintiff's application for suspension of deportation —a request to the Attorney General of the United States under 8 U.S.C. 155(c) to exercise his *discretion* in favor of plaintiff.

Paragraph VI of the Complaint alleges that plaintiff is eligible for suspension of deportation under the provisions of 8 U.S.C. § 155(c)(2).[1]

Paragraph IV alleges that the principal ground upon which plaintiff's application for suspension of deportation was denied . . . was plaintiff's refusal to answer questions asked before the Hearing Officer in the deportation proceedings about his membership or affiliation with certain organizations . . ."

Paragraph III alleges that plaintiff's application for suspension was denied and that after he was taken into custody for purposes of deportation a petition for a writ of habeas corpus was filed, which was also denied.

Paragraph VII alleges that by reason of certain new decisions by Courts of Appeal plaintiff "abandoned his former position of refusal to answer questions regarding his membership in or affiliation with organizations and requested the Board of Immigration Appeals to re-open his case". He offered if the case was so re-opened to testify in answer to the questions which had been asked, or similar questions regarding his membership in or affiliation with organizations, for the five-year period during which under the provisions of 8 U.S.C. § 155 he was required to establish good moral character.

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[1]Section 155 was repealed by Public Law 414, Immigration and Nationality Act of 1952, but for the purposes of this action defendant concedes that the application for suspension was saved by the Savings Clause, Section 405 of Public Law 414, set forth as a footnote to Section 1101 of Title 8 U.S.C.

Paragraph VII concludes: "The application was denied by the Board of Immigration Appeals on March 22, 1955, on the ground that plaintiff had failed to establish his eligibility for suspension of deportation."

From the foregoing allegations of the complaint the following is established:

1. Plaintiff is a deportable alien.

2. He was eligible to apply for suspension of deportation under Title 8 U.S.C. 155(c).

3. He did so apply for suspension of deportation.

4. The application was entertained in that a hearing was held at which plaintiff was afforded the opportunity to show why the discretionary relief should be accorded him.

5. He refused to answer any questions about his membership in or affiliation with certain organizations.

6. Upon the refusal to answer the questions the relief sought was denied.

7. Plaintiff sought to reopen his case by offering to answer questions regarding his membership in or affiliation with certain organizations for the five-year period during which he was required to establish good moral character.

8. The application to reopen was denied by the Board of Immigration Appeals on March 2, 1955.

QUESTIONS PRESENTED.

1. Upon the allegations of the complaint, has the plaintiff stated any cause for judicial intervention in the immigration proceedings?

2. Is the Attorney General an indispensable party?

STATUTE INVOLVED.

The Immigration Act of 1917, as amended by the Act of July 1, 1948, 62 Stat. 1206:

> "Sec. 19(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States seven years or more and is residing in the United States upon the effective date of this Act. *If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons*

for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. . . ." (Italicized portion was not quoted by Appellant.)

ARGUMENT.

I.

ON THE ALLEGATIONS OF THE COMPLAINT NO CAUSE IS STATED FOR JUDICIAL INTERVENTION.

As stated hereinabove the allegations of plaintiff's complaint establish that an application for suspension of deportation was made and that said application was entertained by the Immigration and Naturalization Service; that a hearing was held upon said application and that at said hearing appellant *refused to answer questions.* No question was raised as to the statutory eligibility of the appellant to file the application. The relief requested was denied on the "principal ground" of appellant's refusal to answer the questions asked. It is appellant's contention that

although he may stand firm and refuse to answer questions, there is a burden upon the Attorney General to establish that he is not entitled to the benefit of discretionary relief. It is clear that the Congress of the United States in permitting an executive officer of the United States, to-wit, the Attorney General, to exercise a discretion has definitely imposed upon the appellant the burden of establishing that he is worthy of the relief sought.

This Court in the case of *Barreiro v. Brownell,* 215 F.2d 584, cert. denied 348 U.S. 887 held:

> "The power vested in the Attorney General by paragraph 155(c) was a discretionary power. Hence the Attorney General would not have been required to suspend appellant's deportation, even if appellant had alleged and proved, and had obtained a judgment declaring that he was eligible for such suspension."

In *Chavez v. McGranery,* 220 F.2d 857, this Court with reference to 8 U.S.C. 155(c) said:

> "Unquestionably the action so far taken by the administrative agency was 'by law committed to agency discretion.' It is clear petitioner received from the agency upon his own formal request some relief in their discretion. He has no ground to sue because in a matter committed to discretion, they failed to go further."

The Second Circuit, in *United States ex rel Kaloudis v. Shaughnessy,* 180 F.2d 489, held that where one is eligible for suspension of deportation, he is entitled to the exercise of the Attorney General's discretion, but

"The power of the Attorney General to suspend deportation is a dispensing power like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace over which courts have no review, unless . . . it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant. It is by no means true that 'due process of law' inevitably involves an eventual resort to courts, no matter what may be the interest at stake; not every governmental action is subject to review by judges."

See also:

United States ex rel Matranga v. Mackey, 210 F.2d 160, cert. denied 347 U.S. 967;

United States ex rel Weddeke v. Watkins, 166 F.2d 360, at p. 373, cert. den. 333 U.S. 876;

United States ex rel Frangoulis v. Shaughnessy, 210 F.2d 572, at p. 574;

Adel v. Shaughnessy, 183 F.2d 371, 373.

The duty of the Court is ". . . to make an overall evaluation of the procedures used, the facts disclosed, and the decision reached, with the understanding that the order is unassailable if the statutory proceedings are fairly followed."

Application of Orlando, 131 F. Supp. 485.

The Court may take note of *Hyun v. Landon,* 219 F.2d 404, affirmed by the Supreme Court, at per curiam March 26, 1956, 24 L.W. 3252 by an equally divided Court, wherein this Court stated:

"Both this Court and the Supreme Court of the United States have held that an inference may be drawn from the refusal of an alien to testify in his own behalf in deportation proceedings."

Bilokumsky v. Tod, 263 U.S. 149, 153.

II.

THE ATTORNEY GENERAL IS AN INDISPENSABLE PARTY.

On this point this Court in ruling on the Motion for a Stay of Deportation herein had the following to say:

"The failure to join the Attorney General presents a substantial question: If the court resolved the substantive issue in favor of *Jimenez,* could it issue an effective order against the District Director of Immigration alone? This court has not ruled on whether the Attorney General is an indispensable party to an action such as this one.[2]"

In Footnote 2 the following was said:

"This court has expressly declined to rule on the question. *Rodriguez v. Landon,* 212 F.2d 508, 509. Note 6."

Turning to *Rodriguez v. Landon,* 212 F.2d 508, this Court said:

"If the Order of June 4, 1951, was reviewable under 5 U.S.C.A. 1009, the Commissioner of Immigration and Naturalization was an indispensable party to any action seeking such review."

This Court also said:

> "Although named as a party to this action the Attorney General[6] was not served with process and could not have been so served in this action, his official residence being in the District of Columbia."

Footnote 6 states:

> "As to whether the Attorney General was an indispensable party, we expressed no opinion."

The concluding sentences of the Opinion are as follows:

> "The complaint prayed for declaratory relief, but it did not appear from the complaint that there was any actual controversy between appellant and appellee, the only parties before the court. In short, the complaint stated no claim upon which relief could be granted."

The only parties before the Court were the appellant *Rodriguez* and the appellee *Landon,* the District Director of Immigration and Naturalization in Los Angeles. From the foregoing it would appear that there was no question in the Court's mind that the District Director was not a proper party and that there was no "actual controversy" between the appellant and the District Director. There also appears to have been no question but that the Commissioner of Immigration and Naturalization was an indispensable party. There was obviously no reason for determining whether or not the Attorney General was an indispensable party after the Court had concluded

that there was no "actual controversy" between the appellant and the appellee.

In the instant case the only appellee is Bruce Barber, the District Director of Immigration and Naturalization. It would, therefore, appear that there is no "actual controversy" between the appellant and the appellee as in the *Rodriguez* case.

Ceballos v. Shaughnessy, (CA 2) 30 F. Supp. 30, aff. 229 F.2d 592.

CONCLUSION.

We fail to discover any material issue argued by appellant in his brief. He is admittedly an alien illegally in the United States in that at the time of his entry he was not in possession of an unexpired immigration visa. Appellant would like us to argue the question of whether or not a member of the Communist Party *may be deported* by reason of his membership in that organization. On page 26 of his Brief he states the question as follows:

> "Thus we are brought to the question whether the provision that a member of the Communist Party may be deported by reason of his membership in that organization is either on its face or as construed and applied a bill of attainder."

It does not appear from the Brief how appellant reaches this question from his failure to answer questions in support of his application for discretionary relief of suspension of deportation. The same asser-

tion is made with regard to subdivisions 1 and 3 of appellant's brief. Generally as to these matters the following cases are dispositive:

Harisiades v. Shaughnessy, 342 U.S. 580;
Galvan v. Press, 347 U.S. 522;
Bugajewitz v. Adams, 228 U.S. 585, 591;
Mahler v. Eby, 264 U.S. 32, 39.

The appellant has failed to allege a cause for judicial intervention. The order of the Court below dismissing the action should be affirmed.

Dated, San Francisco, California,
April 20, 1956.

Respectfully submitted,
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